UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

SOUTHCOAST HOSPITALS GROUP, INC.

and

Case No. 1-CA-067303

1199 SEIU UNITED HEALTHCARE WORKERS EAST

Alejandra Hung, Esq., for the Acting General Counsel. Betsy Ehrenberg, Esq., (Pine Rome Ehrenberg PC), of Boston, MA, for the Charging Party.

Anthony D. Rizzotti, Esq. and Gregory A. Brown, Esq., (Littler Mendelson, P.C.), of Boston, MA, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

Kenneth W. Chu, Administrative Law Judge. This case was tried on December 3, 4, 2012 in Boston, Massachusetts. An amended complaint and notice of hearing was issued by the Regional Director for Region 1 of the National Labor Relations Board (NLRB) on September 21, 2012 based upon a charge filed by 1199 SEIU United Healthcare Workers East (the Charging Party or Union). The complaint alleges that Southcoast Hospitals Group, Inc. (the Respondent) has maintained a hiring policy which prohibits union represented employees at one of its hospital from receiving consideration for employment at its other unrepresented facilities until the second round of review during the employment selection process.

Specifically, the complaint alleges that since April 24, 2011¹ and in accordance with the described policy, the Respondent refused to consider employees represented by the Union at Tobey Hospital, to include Christopher Souza, Noelia Nunes and others known to the Respondent, as transfer applicants to positions at facilities other than Tobey Hospital. Further, in accordance with the described policy, the Respondent refused to hire and/or delayed offers to hire employees represented by the Union at Tobey Hospital, including Noelia Nunes and others known to Respondent, as transfer applicants to positions at facilities other than Tobey Hospital.

The Acting General Counsel maintains that the Respondent, in granting a preference only to its employees who have not chosen to be represented by a labor organization for the purpose of collective bargaining, discriminates against union represented employees on the bases of rights guaranteed by Section 7 of the National Labor Relations Act (NLRA or Act) and further, the Respondent has interfere with, restrain, and coerce such employees in the exercise of the rights guaranteed in Section 7 in violation of Section 8(a)(3) and (1) of the Act.

¹ All dates are in 2011 unless otherwise indicated.

Respondent filed a timely answer to the complaint denying the material allegations in the complaint (GC Exh. 1).² Six individuals were called to testify during the trial. After the close of the hearing, the briefs were timely filed by the Acting General Counsel and Respondent, which I have carefully considered. On the entire record, including my observation of the demeanor of the witnesses. I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

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The Respondent, a Massachusetts corporation with its principal office and place of business located in Wareham at Tobey Hospital, is engaged in the business of health care services throughout southern Massachusetts and East Bay, Rhode Island. During a representative 1 year period, the Respondent derived gross annual revenue valued in excess of \$250,000 and purchased and received goods and materials at its Tobey Hospital valued in excess of \$5,000 directly from suppliers located outside of the Commonwealth of Massachusetts. Accordingly, I find, as the Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

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The Respondent Southcoast Hospitals Group was created in June 1996 and is comprised of three hospitals with approximately 20 ancillary health facilities. The three hospitals are located in Massachusetts with Tobey Hospital (Tobey) in Wareham, Charlton Hospital (Charlton) in Fall River, and St. Luke's Hospital (St. Luke's) in New Bedford. Of the three hospitals, only Tobey was and is represented by a labor union. The Union is the exclusive collective bargaining representative of an appropriate unit of technical, clerical, service and maintenance employees and is a party to a collective bargaining agreement with Tobey.³ The employees of the unit comprise approximately 215 of 550 employees at Tobey. The two other hospital facilities have never been represented by a labor organization. There are approximately 4,800 employees comprising of the two nonrepresented hospitals and ancillary facilities (Tr. 45; 161-162).

The Acting General Counsel alleges that 1) the Respondent violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing an employment selection process policy that prohibited represented employees at Tobey from receiving consideration at its unrepresented facilities for employment until the second round in the selection process; 2) the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider Christopher Souza (Souza), Noelia Nunes (Nunes) and other similarly situated union employees for hire at the Respondent's unrepresented facilities until the second round in the selection process; and 3) the Respondent

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² Testimony is noted as "Tr."(Transcript). The exhibits for the Acting General Counsel and Respondent are identified as "GC Exh." and "R Exh." Joint exhibits are identified as "Jt Exh." Closing briefs for the Acting General Counsel and Respondent are identified as "GC Br." and R Br."

³ The Union also represents Licensed Practical Nurses in a separate contract, which is not a subject of this complaint (Tr. 63).

violated Section 8(a)(3) and (1) of the Act by refusing to hire Nunes for the Operating Room Assistant position and delayed in hiring her for a Mobility Aide position at the unrepresented St. Luke's facility.⁴

1. The Employment Selection Process

As part of the process in selecting applicants for open positions, the Respondent has promulgated and maintained an Employment Selection Process Policy (HR 4.06) since April 1999. The purpose of the policy is to provide standards in recruiting, interviewing and hiring applicants for open positions within the facilities (GC Exh. 2). In recruiting for internal and external candidates, HR 4.06, in relevant parts, stipulates

A. Internal Applicants:

Upon application, regular status employees who are beyond the introductionary period will be given first consideration for job postings providing the regular status employee's qualifications substantially equal the qualifications of external candidates. Employees in a union will be considered internal candidates if the collective bargaining contract provides reciprocal opportunity to employees who are not members of the union for open positions at the unionized site. Temporary and per diem status employees will be considered prior to external applicants.

B. External Applicants:

Employees in a union whose collective bargaining contract does not provide reciprocal opportunity to employees, who are not members of the union, will be considered external candidates.

External candidates may be selected if no employee is an ideal candidate, and if there is not an opportunity to train inexperienced internal candidates due to clinical/operational imperatives, turnover, lack of training resources, etc.

During the relevant time period from January 1 through December 31, the Union and the Respondent have been parties to a collective bargaining contract (contract). Since January 1, the Union enjoyed a preference in the hiring and transferring of unit employees to open unit positions in Tobey. Under the terms of the expired and the contract in effect at the time of this complaint, Section 8.2 "Vacancies" require the Respondent to first consider unit employees for open bargaining unit positions. The union represented employees are hired into open bargaining positions based on minimal qualifications and seniority during what is considered as the first round in the employment selection process. The nonrepresented employees working at St. Luke's and Charlton are considered internal candidates but are not considered until after the applications of all unit employees have first been reviewed and no selection made. If no unit employees have been selected, nonunit applicants would then be considered during the second round of interviews (GC Exh. 5 and 6).

Consistent with Section 8.2 of the contract, it is not in dispute that unit employees at Tobey receive a preference over nonunit employees as applicants for bargaining positions. In similar fashion, nonunit employees applying for open positions at St. Luke's and Charlton would enjoy a preference of being considered in the first round under HR 4.06. The unit employees

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⁴ GC Br. at 2, 3.

from Tobey applying for open nonbargaining positions would be considered in the second round only if no selection was made of a nonunit employee in the first round.

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David DeJesus (DeJesus) was and is employed as the senior vice-president for Human Resources for Southcoast Health System for the last 7 years. He was first employed by the Respondent in June 1996 as the vice-president of Human Resources. He said that the Respondent was created in June 1996 when the three hospitals were combined into one health network. DeJesus stated that only Tobey was and is represented by the Union. DeJesus was responsible for creating HR 4.06 which was implemented on April 5, 1999. DeJesus explained that the purpose of HR 4.06 was to standardize hiring policies and practices across the three hospitals. Prior to working for the Respondent, DeJesus was employed at another health system that had two facilities with one being represented by a labor organization. He said that the unrepresented employees would complain to him that they felt disadvantaged for job vacancies because union employees would be able to bid on positions at their represented facility, but the unrepresented employees were not able to bid on bargaining positions at the represented facility. DeJesus said he was sensitive to these complaints when he began working with the Respondent.

DeJesus has served on the Respondent's bargaining committee from 1996 to 2010. He said he attempted to negotiate a reciprocal arrangement with the Union in 1997/1998 so that bargaining unit positions would be equally open to nonunion employees. He was unable to successfully bargain with the Union on opening up bargaining positions for nonunion employees (Tr. 145-157; R Exh. 1).

In an effort to create uniformity, the Respondent decided not to consider union employees for nonbargaining unit positions at St Luke's and Charlton until after nonunion employees were first considered. DeJesus explained his rationale for HR 4.06

It's, in our perspective, it's a matter of equity. That if a position is posted at the Tobey site and represented by either of the Unions, then people at St. Luke's or Charlton would not be considered in the first round at Tobey for the two contracts. So if it works that way at the Tobey site, then our view it should work the same way in the other direction (Tr. 151).

Consequently, HR 4.06 gave a preference to nonunion employees applying for open positions at the nonunion facilities (Tr.145-149). DeJesus testified that a vacancy announcement for an open position is posted for 5 calendar days and all internal and external candidates' applications would be accepted during this 5 day period. He explained that nonunion employees applying for open positions at St. Luke's and Charlton would be considered in the first round at the two facilities. He said that union employees would be considered in the second round of interviews only if a nonrepresented employee is not selected. Despite what the policy states above, union employees at Tobey applying for open positions at either St. Luke's or Charlton are actually considered in the second round and not as external applicants (which would have placed the union employees in the third round of consideration). In Tobey, DeJesus explained that union employees are given first consideration for open bargaining positions based upon their qualifications and seniority. DeJesus lamented that the contract effectively prevents St. Luke's and Charlton employees from moving over to Tobey because the bargaining positions require that the union employee have only minimal qualifications for selection (Tr.150-154).

Mary F. Medeiros (Medeiros) explained how HR 4.06 would interface with Section 8.2 of the contract at St Luke's and Charlton. Medeiros is currently employed as the Human

Resources Business Partner at St. Luke's. Prior to that position, she served for 19 years as the Human Resources Consultant at the same hospital (Tr. 176-179). Medeiros stated that, among other duties, she is responsible for guiding managers through the employment selection process, screening applicants and providing statistical reports. Medeiros explained that the employment process begins when a manager completes an employment requisition for a position that needed to be filled. The requisition would include, among other things, the position, work shift, scheduled hours, and who is being replaced. After completing the requisition, the request is then forwarded to the director or vice-president for approval.

Once the job requisition is approved, it is forward to the Human Resources office for posting. The posting of the vacancy is for 5 calendar days on the Respondent's intranet website and paper posted on the bulletin boards. Medeiros said that vacancies are routinely posted for 5 calendar days and is open for internal and external candidates so that the Respondent would not have to post a second time for external candidates.

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Medeiros confirmed that union employees would be considered first before nonunion employees for open bargaining positions at Tobey. She said that at St. Luke's and Charlton, only regular scheduled employees working at these two hospitals are considered in the first round. Medeiros stated that union employees from Tobey would be considered in the second round, along with per diem employees if no candidate is selected. Medeiros said that external candidates are considered in the third round if an internal candidate is not selected (Tr.179-182; R Exh. 2). Medeiros reiterated that the union employees from Tobey would be considered in the second round only after the first round of nonunion employees have been considered and not selected (Tr. 224).

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Anne Colwell (Colwell) is and has been employed as the vice-president of Human Resources Southcoast Hospitals Group for the last 7 years. Colwell testified that under the contract with the Union at Tobey, represented employees with minimal qualifications would be hired for open bargaining positions in Tobey and nonunion employees would not even be considered. Colwell explained that open bargaining positions at Tobey would have the same 5 calendar day posting and unit employees applying within the 5 day period would be considered in the first round. Internal employees outside of the unit would be considered in the second round (Tr. 236-238). Colwell stated that under the contract, managers are not free to consider second round candidates if there is a qualified unit employee candidate. In contrast, Colwell testified that hiring officials in the nonunion facilities are not required to select a nonrepresented employee, but would be free to consider union employees during the second round of interviews in the hiring process (Tr. 242).

2. Christopher Souza's employment selection process

a. Souza's application was not considered

The Acting General Counsel contends that Christopher Souza (Souza), a represented employee at Tobey, was never considered for an open building superintendent position under the Respondent's HR 4.06 policy that gave first consideration to nonrepresented employees.

Souza testified that he was employed as a mechanic at Tobey for over 11 years and is a member of the appropriate unit represented by the Union. Souza's job title at Tobey is listed as

the HVACPM Coordinator.⁵ In May, the Respondent posted an open position for the position of building superintendent at one of St. Luke's facilities. The building superintendent position is a nonbargaining position. Souza timely applied online for the position through the Respondent's intranet application process (Tr. 19-22).

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The position was posted on May 16 and had a 5 day posting period. Souza applied on May 18 (GC Exh. 3 and 4). Lucilia Darosa (Darosa) informed Souza in an email dated June 22, that "Just informing you that the position above has been filled and that another candidate was chosen for the position" (Jt Exh. 1).

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Souza believed that Darosa was employed at the time in the Respondent's Human Resources office.⁶ Souza replied back in an email to Darosa on June 23, stating that he was more than qualified for the position and did not understand why he was not interviewed. Souza was informed on the same day in a second email from Darosa the following

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At the same time, we would not be able to consider you for the first round interviews as you currently work at Tobey in a SEIU position. According to our policy (4.06) any Tobey (SEIU) and/or per diems are not considered in the first round of interviews (Jt Exh. 1).⁷

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Souza stated he looked into the policy, which he readily accessed on the Respondent's intranet. He said that HR 4.06 stated exactly what was represented to him by Darosa. He testified he was never aware of this policy even though he had been a union delegate (Tr. 24-26). Souza did not speak to his supervisor or anyone in management about the Respondent's refusal to consider him for the position (Tr. 38, 39). Instead, Souza complained to Lisa Lemieux shortly after receiving the emails from Darosa (Tr. 30, 31).

b. The involvement of Lisa Lemieux

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Lisa Lemieux (Lemieux) was a union organizer at Tobey from 2005 to August 2012 and was involved in handling grievances, arbitrations, labor-management meetings, training stewards and conducting membership meetings. Lemieux testified that Souza complained to her that the Respondent did not consider him for a building supervisor position at St Luke's because he was a member of the Union. Lemieux said that Souza also gave her a copy of HR 4.06. Lemieux denied being aware of HR 4.06, but maintained that she had received complaints from unit employees since 2005 about the hiring practices at St. Luke's and Charlton.

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Admittedly, although made aware of these complaints since 2005, Lemieux never discussed the matter with the Respondent or filed a prior complaint with the Board until Souza complained in 2011. Lemieux also vaguely recalled some discussions over the Respondent's proposal on seniority and bidding for jobs during contract negotiations in 1998, but she could not recall what was discussed or what was the exact proposal made by the Respondent. Lemieux testified that she did not recall any discussion during the negotiations regarding the Respondent's employment selection process (Tr. 64-67).

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⁵ HVACPM is an acronym for Heating, Ventilation, and Air Conditioning Preventative Maintenance.

⁶ Darosa was the Human Resource coordinator at the time. The parties stipulated that she was the agent for the employer only with regard to the two emails she sent to Souza on June 22 and 23 (Tr. 27).

⁷ The allegation raised with respect to Souza was limited to the failure of the Respondent to consider him for the building superintendent position and not a failure of the Respondent to hire him (Tr. 33).

Upon receiving and reviewing a copy of HR 4.06, Lemieux felt that the policy was discriminatory because "union workers were being treated differently than workers at St. Luke's or Charlton." Lemieux stated that she attempted to discuss the policy with Colwell shortly after Souza had complained, but was told by Colwell that management was not interested in discussing this topic (Tr. 48-51, 60). Colwell testified that she does not recall discussing HR 4.06 with Lemieux and only became aware of the alleged unfair labor practice charge in the summer/fall of 2011 (Tr. 238, 239).

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Lemieux pursued the matter further by surveying the Union membership as to how many were discriminated against when applying for jobs at St. Luke's and Charlton. She sent out an email on July 20 to approximately 100 out of 215 Union members. The purpose of her email was to determine whether other union members were also denied consideration or selection to a nonunit position. Lemieux's email stated, in part

It has come to our attention that Southcoast has been discriminating against the union members who have applied for other jobs at St. Luke's and Charleton (sic).

 Tobey workers are being told that they will not even be considered because they are i (sic) the union.

If you are one of those people or know somebody that this has happend (sic) to...please let me know. All this is to help us prepare for the filing of a labor board charge against Southcoast (GC Exh. 7).

Lemieux recalled receiving three responses (Tr. 52, 67). Lemieux received an email from Christine D'Arci (D'Arci) dated November 22, who was a union steward and a member of the Union bargaining team at the time. The email from D'Arci was actually a forwarded email that D'Arci received from Meaghan Carroll (Carroll) on November 8. At the time, Carroll was the Respondent's Human Resource coordinator. The email from Carroll to D'Arci referenced an open control desk coordinator position that D'Arci had applied for at St. Luke's. The email stated that consideration for this position is

...currently in the first round of interviews. As an SEIU/MNA member, your application will be considered if the position remains open after the first round (Jt Exh. 2 and 3).

Subsequently, D'Arci was informed by Medeiros in an email dated November 17 that the position was filled. The Respondent never considered D'Arci for this position because the Respondent selected another applicant during the first round (Tr. 51-55; JT Exh. 2, 3).8

Lemieux received a second response from Debra Ladd (Ladd) in an email dated July 22. Ladd was a unit employee and a Union delegate at the time (Tr. 55, 56; GC Exh. 7). Ladd complained to Lemieux that since she was a member of the Union, she would not be considered for a nonbargaining position until the second round and that she would not likely be considered because there were numerous applicants at the other sites (GC Exh. 7).

Lemieux testified that she received a third response from Joan Monte (Monte), who was a nurse assistant and Union delegate at the time. Monte had informed Lemieux that there was another unit employee, Noelia Nunes, who was denied a nonbargaining position because of her

⁸ D'Arci complained to Lemieux after the Union had filed its initial charge (Tr. 70).

union affiliation (Tr. 78).9

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3. Noelia Nunes' employment selection process

a. The Certified Nursing Assistant-I and II vacancies

The Acting General Counsel alleges that the Respondent failed to consider Noelia Nunes (Nunes) for a Certified Nursing Assistant-1 (CNA-I) and for a Certified Nursing Assistant-2 (CNA-II) position at St. Luke's because of her union affiliation. Nunes testified that she was employed as a CNA at Tobey from 2010 to 2012 and is a member of the bargaining unit. During her employment at Tobey, Nunes had applied for five or six open vacancies in other Southcoast network facilities. All of Nunes' applications were completed on the Respondent's intranet website. The Respondent did not select Nunes on any of her prior applications.

In July, the Respondent posted a vacancy for a CNA-I at St. Luke's. The CNA-I vacancy was posted on July 5 for 5 calendar days (GC Exh. 9). Nunes timely submitted her application through the Respondent's intranet website. Although the position at St. Luke's was identical to her CNA position at Tobey, Nunes said that she was interested in getting a transfer to St. Luke's because she lived closer to St. Luke's and it would greatly reduce her commuting time.

Nunes testified that approximately 2 weeks after her application was submitted on the Respondent's intranet website, she was informed that because she worked "...at Tobey Hospital and I was represented by the Union, I wouldn't be considered until [the] second rounds." Nunes did not keep a copy of the email, but believed it was sent from the Respondent's Human Resources office. She did not recall when and who had sent her that email (Tr. 82-86).

As part of the employment selection process, the Respondent maintains a job certificate for each posted position. Among other items, the certificate lists the names of the employees who had applied for the posted position. Alongside Nunes' name, it was noted "Tobey-not 1st round-Position filled during 1st round." Nunes was never interviewed for this position because the Respondent filled the position on July 20 during the first round (GC Exh. 9).

On August 9, the Respondent posted an open vacancy for a CNA-II at St. Luke's. The posting was opened for 5 calendar days until August 14. Nunes testified that she applied for the position in September. Nunes did not have the requisite medical assistant or EMT certifications that were preferred experience for the CNA-II position. Nevertheless, she believed she was qualified because she was told by coworkers that the Respondent will train and provide orientation for the successful incumbent who may lack the requisite and preferred skills (Tr. 87-89). Nunes testified she received an email informing her that the position was filled. The job certificate noted next to Nunes' name, "Late application, not interviewed" (Tr. 89; GC Exh. 10).

The Respondent considered Nunes' job application for the CNA-II position as being submitted late and she was not interviewed. The posting stated that applications must be submitted from August 9 through August 14. Nunes' application had a submission date of September 20 (GC Exh. 10). The successful applicant was offered the position on September 15 during the first round of consideration. Medeiros testified that submissions after the posting date would be deemed as late and would be considered in the second round. In addition to Nunes, several other candidates' applications were submitted late and were not considered during the first round (Tr. 181; R Exh. 2; GC Exh. 10).

⁹ The Respondent requested the email from Monte, but was not available (Tr. 55, 69, 78).

b. The Operating Room Assistant-I and II vacancies

The Acting General Counsel alleges that Nunes was not hired for the Operating Room Assistant-1 (ORA-I) position and not considered for the ORA-II position due to her union affiliation. The Respondent initially posted the ORA-I vacancy from October 17 to October 22. Nunes applied on October 17 (Tr. 92; GC Exh. 12). Nunes was not considered for the ORA-I position until the second round because of HR 4.06. On the job certificate, it was noted alongside Nunes' name, "Not Hired, Position Filled-general-no interview SEIU (2nd round)."

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The initial posting was filled on November 29 with an offer of the job to Patrick Mentzer (Mentzer). Mentzer declined the position after learning that the Respondent decided to reduce the position's full-time schedule to 32 hours (Tr. 197; GC Exh. 12). The same position was then offered to Erika Dulude (Dulude) on December 9. Dulude accepted the position but the offer was rescinded after she was not medically cleared for employment. Dulude was not employed by the Respondent at the time and was considered an external candidate. The ORA-I was reposted on December 22 through 27 after the Respondent rejected Dulude for the position. Medeiros testified that if an open position is reposted, the applicants from the first job posting would not have to reapply (Tr. 197). The eventual successful candidate, Summer Sylvia (Sylvia), had withdrew her application during the first posting, but reapplied under the second posting on December 22. Sylvia is a nonrepresented employee from Charlton (GC Exh. 12).

Nunes testified she was never considered for the ORA-I position. However, the job certificate for the second posting alongside Nunes' name noted, "Has applied for the second posting and application forwarded to manager" (GC Exh.12). It would, therefore, be reasonable to conclude that Nunes' application was considered during the second posting. In fact, manager Marianne Almeida, did consider Nunes for the position, but determined that Nunes did not have EKG or phlebotomy experience (R. Exh. 5).

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The ORA-I position required phlebotomy and EKG skills (GC Exh. 12; Tr. 197). The Respondent said Nunes did not have phlebotomy and EKG skills (Tr. 189; R Exh. 5). Nunes admitted that she did not have the required phlebotomy skills. She said that as a CNA at Tobey, she had EKG skills. She maintains that she was informed by another coworker, Mary Guilotte (Guilotte), that the Respondent had taught the requisite skills to Guilotte once she was placed on the job. Nunes believed the Respondent would have taught her the phlebotomy and EKG skills once she was placed in the ORA-I position (Tr. 93-95; 128).

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Shortly after the initial posting for the ORA-I vacancy, the Respondent posted a vacancy for an ORA-II position at St. Luke's from October 26 to November 1. The ORA-II position is a higher level position than ORA-I (Tr. 204). The ORA-II required knowledge of medical terminology (GC Exh. 13). Nunes applied for this position on October 27, but was not considered. On the job certificate, it was noted alongside her name, "Position Filled-no interview-Tobey site (not for 1st round)" (GC Exh. 13). Nunes testified she applied for the position, but was subsequently informed by an email from Human Resources that the position was filled.

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Nunes believed she was qualified for the ORA-II position and although she did not have the required knowledge in medical terminology, she again maintained that the Respondent would have trained her in this area. She was confident in learning her new skills within 2 days (Tr. 95-99). Medeiros distinguished the fact that the Respondent may consider an applicant who lacks a "preferred" skill and a manager may be willing to train that applicant, but an applicant that lack a required skill would be considered unqualified (Tr. 232-235).

c. The Mobility Aide vacancies

The Acting General Counsel alleges that Nunes was not timely considered and selected for the position of a Mobility Aide position at St. Luke's. It is alleged that Nunes should have been considered earlier in the employment process and that the Respondent delayed her selection because of her union affiliation.

By way of background leading to this allegation, the Respondent initially posted an open vacancy for the Mobility Aide position on September 27 to October 1. The position was for a "...current 40 hour Mobility Aide in the Pilot Program" and "this was an internal posting (ie, within the department for a temp employee to apply for a permanent opportunity)" (GC Exh. 10). Nunes applied for the position on September 26, but was shortly informed by the Human Resources office that the position was filled (R Exh. 4). A review of the job posting shows that this vacancy announcement was intended to place a temporary employee into the Mobility Aide position on permanent basis. There were four job applicants for the open Mobility Aide position. Except for the temporary employee who was selected, the remaining three applicants, including Nunes, had a notation alongside their names that stated "Not interviewed as the employee selected is already in the position" (GC Exh. 11).

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Medeiros stated the Mobility Aide announcement posted on September 27 was actually not a vacancy, but part of a pilot program to determine whether temporary positions could be converted to permanent positions. The Aide position was temporarily filled with a non-permanent employee for Respondent to determine whether the position was actually needed. She said that once the Respondent approved this position (and others) as permanent, the temporary employee already in the position would be made a permanent employee. The person selected for this position was Leslie Parent (Parent). Parent was a temporary employee in a Mobility Aide position at the time. Parent's application states, in part, "Have a temporary position as a mobility aide and would like to continue working for Southcoast Hospitals Group" (R. Exh. 3). Medeiros stated that the Mobility Aide position was the same job held by Parent except it was now posted as a regular permanent position.

The Acting General Counsel does not dispute that Nunes was ineligible for the Mobility Aide position that was part of the Respondent's pilot program to convert a temporary employee into a permanent position¹⁰ (Tr. 185-187; R Exh. 3). Any allegations that the Respondent violated the Act for not considering Nunes for the Mobility Aide vacancy posted on September 27 are dismissed.

It is the second posting of the Mobility Aide position that is of controversy. The Respondent reposted the Mobility Aide position at St. Luke's from December 9 to December 14. The position held by Parent became vacant when she resigned from the position. This position did not require knowledge of medical terminology, but it was nevertheless a preferred skill for an applicant to possess. Nunes said she did not have knowledge in medical terminology, but maintains that the Respondent would have trained her once she was in the position. Nunes timely applied for this position on December 12 and it was noted on the job certificate alongside her name that "Application was not reviewed by manager." The same certificate also noted that an external candidate, Doris Knight (Knight), was interviewed for the position on January 6, 2012 (GC Exh. 14). Nunes, however, subsequently received a telephone call for a job interview from the Human Resources office. She could not recall the person who had contacted her.

¹⁰ GC Br. at fn. 9.

Nunes said she was interviewed in January and offered the position shortly thereafter. It seems that Nunes was interviewed either on January 17 or 18, 2012. The Respondent selected Nunes for the position on January 30, 2012 (GC Exh. 16).

Nunes said she gave 2 weeks' notice to her supervisor, but did not start her new job until March 15, 2012. Nunes was asked by her supervisor to stay in her former position a little longer because there was nobody available to replace her and Nunes agreed (Tr. 99-102; 128; 135, 136).

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III. DISCUSSION AND ANALYSIS

Section 8(a)(3) of the Act makes it unlawful for an employer to discriminate against employees to discourage their membership in a labor organization. Section 8(a)(1) protects from employer interference of employees' rights to engage in protected and concerted activities. Section 7 of the Act provides that employees have the right to engage in protected and concerted activities. A hiring policy that discriminates on the basis of Section 7 considerations violates Section (a)(3) and (1). Legacy Health System, 354 NLRB 337 (2009).

A. The Union is not estopped from challenging the policy

As an initial matter, the Respondent contends that the Union is equitably estopped from challenging the preference policy because HR 4.06 has been in place for over 11 years before the time the Union filed the underlying unfair labor practice charges in this complaint. A union's constant acquiescence to an employer's unilateral action for sustained periods of time can equitably estop a union from demanding bargaining on that subject. *Manitowec Ice Co.*, 344 NLRB 1222 (2005); *Tucker Steel Corp.*, 134 NLRB 323, 333 (1961).

The Respondent asserts that Lemieux was not a credible witness when she testified that she was unaware of HR 4.06 until it was brought to her attention by Souza. The Respondent contends that it had proposed to the Union the same type of preference enjoyed by employees at St. Luke's and Charlton conditional upon the Union's agreement to change the "most senior qualified" provisions of the contract to "best qualified" standard during their 1997-98 contract negotiations (R Exh. 1). The Respondent states that the Union rejected this proposal and therefore, the Union was undeniably aware of this policy at the time of bargaining. The Respondent argues that the Union's acquiescence to the employer's unilateral action in implementing HR 4.06 for a sustained period of time equitably estopped the Union from demands to bargain over this policy.

The Acting General Counsel maintains that the Union was not aware of the Respondent's practice of deferring unit employees at Tobey for open nonbargaining positions until after the first round of consideration. The Acting General Counsel argues that the Respondent unlawfully maintains and enforces this policy and is not arguing a violation of the Act when the policy was first promulgated. In addition, the Acting General Counsel is not seeking a finding of a violation for any unfair labor practice occurring more than 6 months prior to the filing of the instant charge.

"[A] waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter [W]hen a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter." *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357-58 (D.C. Cir. 2008) (quoting *Dep't of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)).

I find that the Respondent failed to prove that the Union explicitly waived its right to bargain over changes to preference bidding for union jobs in 1998 and is therefore not estopped from challenging this policy. It presented no evidence that the parties fully discussed and consciously explored these changes or that the Union consciously yielded its bargaining rights.

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For that reason, the Board requires "clear and unmistakable' evidence of waiver" and "construe[s] waivers narrowly." see also Honeywell Int'l, Inc. v. NLRB, 253 F.3d 125, 133-34 (D.C. Cir. 2001) ("Board correctly concluded that the Union did not clearly and unmistakably waive its protection against post-expiration unilateral termination of severance benefits."). To find a clear and unmistakable waiver, the evidence must show "that the parties have 'consciously explored' or 'fully discussed the matter on which the union has 'consciously yielded' its rights." Id.; see also Furniture Rentors of America, Inc. v. NLRB, 36 F.3d 1240, 1245 (3d Cir. 1994). In light of no evidence that the Union had clearly and unmistakenly waived its right to bargain over this preference policy, I will not infer a waiver by the Union of its right to bargain about that subject.

I also find that the Union did not implicitly waive bargaining and acquiesced to the policy when the Respondent promulgated HR 4.06. The Union did not object over the policy because it was not aware of the policy until Souza brought the matter to Lemieux's attention. The Respondent's authority to act unilaterally is predicated on the Union's waiver of its right to insist on bargaining. *Provena Hospitals*, 350 NLRB 808 (2007). At most, the Respondent had shown that it had proposed in 1998 to the Union the same preference for represented employees as given to the unrepresented employees to bid on open nonbargaining positions. However, aside from the proposal offered by the Respondent in 1998 (R Exh. 1), no other evidence has been presented demonstrating the Union was aware of the policy until Souza complained to Lemieux.¹¹

I credit the testimony of Souza when he denied knowledge of the policy until he searched for it on the Respondent's intranet website. I also credit Lemieux's testimony in its entirety. Lemieux denied knowing of the policy and vaguely recalled some discussions in 1998 about job bidding and seniority during contract negotiations. She denied recalling any discussions regarding the employment selection process. I find it totally reasonable for Lemieux not to recollect a proposal that was made one time by the Respondent more than 13 years ago. In addition, Lemieux was not the Union representative during these negotiations and would not have had firsthand knowledge of the exchange of contract proposals by the parties. It is a stretch to believe that the Union acquiescence to a policy that it had no knowledge until recently made aware by Souza. Accordingly, I find that the Union never explicitly or implicitly waived its right to bargain over HR 4.06 and was therefore not estopped to challenge the policy. The Union simply cannot acquiesce in a policy unilaterally implemented by the Respondent when it had no knowledge or awareness of the policy.

B. The employment selection policy is not inherently destructive

¹¹ The Respondent also contends that HR 4.06 was readily accessible on the employer's intranet website and therefore, the Union must have known of the policy. However, while the policy may have been open and notorious for viewing, the Union would still need to be aware of the policy in order to search for it on the Respondent's website.

¹² DeJesus testified that the Union representative for the negotiations at the time was Katie D'Urso (Tr. 155).

The unfair labor practice charged here is premised on Section 8(a)(3) which requires a finding of discrimination when the employer's conduct is based upon an employee's union affiliation. In essence, the Acting General Counsel contends that the Respondent violated Section 8(3) and (1) of the Act when it failed to timely consider and hire unit employees for nonbargaining positions by instituting a policy that proscribed the consideration of union employees for nonbargaining open positions until after all unrepresented applicants are considered. I agree with the Acting General Counsel.

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The Supreme Court has recognized that "there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification . . . that the employer's conduct carries with it an inference of unlawful intent so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). If an employer's conduct falls within this category, "the Board can find an unfair labor" practice even if the employer introduces evidence that the conduct was motivated by business considerations." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). If it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of employee rights, no proof of an antiunion motivation is needed even if the employer introduces evidence that its conduct was motivated by business consideration.

The Acting General Counsel concedes that the policy was not inherently destructive of employee rights under *Great Dane Trailers*, supra. I agree and find that the policy did not absolutely preclude represented employees from obtaining nonrepresented positions at St. Luke's and Charlton. Rather, the Acting General Counsel maintains that the discriminatory impact on employees' Section 7 rights under the Act was comparatively slight, citing *Legacy Health Systems*, supra. If the adverse impact of the conduct on employee rights is

"...comparatively slight, an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him." *Great Dane Trailers* at 34.

When the "resulting harm to employee rights is...comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is prima facie lawful and an affirmative showing of improper motivation must be made." *Great Dane Trailers*, supra at 34; *NLRB v. Brown*, 380 U.S. at 289; *American Ship Building*, supra at 311-313.

Since the Respondent's policy is not an absolute prohibition of represented employees obtaining nonrepresented positions at Charlton and St. Luke's, I find that the policy has a comparatively slight impact on the employees' Section 7 rights consistent with *Great Dane Trailers*, supra. In my opinion, HR 4.06 clearly constitutes discriminatory conduct and has a comparatively slight adverse impact on employee rights. By applying different standards for hiring eligibility between union represented and nonrepresented employees, the Respondent has adversely affected the significant rights of represented employees protected by the Act, that is, the right to work unfettered by an employee's union affiliation. Such conduct constitutes discrimination against an employee's union affiliation and the plainest form of Section 8(a)(3)

¹³ The record establishes that during the relevant time frame, at least fourteen union represented employees from Tobey were considered and selected to nonbargaining positions (R. Exh. 6 and 7).

discrimination. Just as workers cannot be dismissed from employment because of their union affiliation, neither can they be denied employment because of their union affiliation.

The finding of a violation does not stop here and the inquiry now turns on whether the Respondent has proffered any legitimate and substantial interests for its policy and if so, was the discriminatory conduct motivated by an antiunion purpose. *Sierra Realty Corp*, 317 NLRB at 834 (1995). The burden remains with the Respondent to establish a legitimate and substantial business justification for its policy. *National Football League*, 309 NLRB 78 (1992).

C. The Respondent failed to proffer legitimate and substantial interests for its policy

The Acting General Counsel maintains that the Respondent had failed to proffer any legitimate and substantial business justifications for the conduct and, therefore, there was no requirement for the Acting General Counsel to prove an antiunion motivation for the conduct.¹⁴ In Legacy Health System, the employer, a hospital system, operated several facilities with multiple collective bargaining agreements with various labor organizations as well as having many positions not represented by a labor organization. For a number of years, the Legacy Health System maintained an unwritten policy of prohibiting employees from simultaneously holding both bargaining and nonbargaining positions. This policy, however, does not prohibit employees from holding two bargaining unit positions nor from simultaneously holding two nonbargaining unit positions. The employer contends that the legitimate and substantial interests for its practice were the legal uncertainties of having employees simultaneously hold both bargaining and nonbargaining positions. Not unlike the situation in Legacy Health System, the Respondent's policy limits union represented employees' career opportunities when the open position happens to be a nonbargaining job. The Board found in Legacy Health System that the hiring practice discriminated on the basis of Section 7 considerations and violated Section 8(a)(3) and (1) of the Act and that it was not necessary to determine if there was antiunion animus in the practice when the employer failed to proffer legitimate and substantial interests for its practice.

Here, I find that the Respondent has not established legitimate and substantial justifications for its preference policy to first consider nonunion candidates for open positions at the St. Luke's and Charlton facilities. The Respondent maintains that the policy is neutral and uniformly applied to nonunion and union represented applicants. It argues that it has legitimate and substantial business interests to treat all of its employees equally and in hiring the best possible applicants for its open positions. I disagree with the premise for this rationale. A cursory review of HR 4.06 may seem like a neutral policy and it is laudable for the Respondent treat all employees in like fashion. However, such purported justification cannot condone conduct that is in fact related to the employees' union affiliation. Employees represented by the Union were refused consideration solely because of their union affiliation.

The Respondent contends that one of the benefits of working at Southcoast is the opportunity for career advancement, but nonunion employees are unable to apply for bargaining unit positions at Tobey due to the Union's contract which permits minimally qualified unit employees to be hired instead of potentially more qualified nonrepresented employees. DeJesus testified that he conceived HR 4.06 to help level the playing field by providing the same hiring preference at the two nonunion facilities so that nonunion employees would be able to advance in their careers.

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¹⁴ See, GC Br.19-21.

DeJesus said HR 4.06 was promulgated due to a number of complaints he had received when he was previously employed at another health network which had a similar contract preference for union represented employees. He maintained that the unrepresented employees were complaining they were essentially shut out of open bargaining positions. DeJesus was determined this would not happen when he became HR vice-president of Southcoast in 1996. My problem with his rationale is that the situation with DeJesus' former employer is not the same situation here. DeJesus was specifically asked if he had received complaints from employees in nonunion facilities about the alleged inequity when applying for Tobey union positions. DeJesus responded

It comes up from time to time. People will say, individual candidates will ask why they can't be considered there if we're all part of Southcoast, that sort of thing.

I find DeJesus' testimony unpersuasive on this point. His testimony lacks specificity and detail information. DeJesus was vague in describing any complaints he may have received while employed with the Respondent. DeJesus did not identify any nonunion candidates who had complained to him that they were not able to advance in their career because of the preference in hiring union represented employees at Tobey. DeJesus could not recall any specific written complaints from nonunion candidates that they were denied consideration for open bargaining positions at Tobey. One could reasonably infer that DeJesus may have anticipated an equity problem when he arrived at Southcoast due to the situation he encountered with his former employer. However, it is unreasonable and inappropriate for him to devise a solution for a problem that did not exist at Southcoast.

The so-called "leveling the playing field" rationale is also problematic for another reason. DeJesus testified that it was a matter of equity that if represented employees receive a preference for open bargaining positions, then nonrepresented employees should receive the same preference for nonbargaining positions. However, the staggering number of potentially open nonbargaining positions as compared to bargaining positions makes this equity rationale troublesome.

The Tobey union membership comprises of approximately 215 unit positions. There are over 4,800 nonbargaining positions at the two nonunion hospitals and ancillary facilities. Nonrepresented candidates have a preference access to far greater open nonbargaining positions in the nonunion facilities to advance their careers. The limited number of bargaining unit positions that a nonrepresented employee is unable to apply would not unreasonably inhibit the career opportunities of these employees given the vast number of potentially open nonbargaining positions that are available. On the other hand, represented candidates are limited in their career advancements when they are not considered until the second round in the hiring process where the chances of being selected are greatly reduced. In my opinion, this does not level the playing field at all.

The Respondent affirmatively argues that assuming a violation of the Act, the violation was de minimis (GC Exh. 2). I disagree. The Respondent contends that only three unit employees complained of the policy after Lemieux sent out her email to approximately 100 unit employees. But, I find that Lemieux credibly testified that she had also received general complaints about not receiving transfers from unit employees since 2005. Although she did not fully investigate the reasons for the complaints, the complaints could well have been due to the Respondent's preference policy. Also, it is possible that the Union would have received far more than a handful of complaints if Lemieux's email went out to the full Union membership. The fact that the three complaints came from union officials is immaterial. They were nevertheless valid

complaints. Finally, the preference policy did not only affect Nunes and Souza or a handful of Union members. It is hardly de minimis when the discriminatory policy potentially affects the wages and livelihood of the entire Union membership. I find particularly revealing the difficult choice that Nunes had to make when she stated in her application for the ORA-I position that "...I know I have the Union here at Tobey but its not an option for me, I rather go to S. Lukes and not have the Union" (GC Exh. 12). I also considered the emails received by Nunes and Souza which plainly stated that their membership in SEIU was the reason they were not considered during the first round of interviews for positions in the nonrepresented facilities. Clearly, it is not a de minimis policy when even a single employee is required to give up her union membership in order to obtain better wages or career opportunities. HR 4.06 discourages membership in the Union by refusing to consider or hire represented employees based solely on their union membership and is a violation of Section 8(1) of the Act and I so find.

D. The failure to consider Souza, Nunes and similarly situated Tobey employees violated Section 8(a)(3) and (1) of the Act

The Acting General Counsel contends that Souza was not considered for the building superintendent position due to his union affiliation. As noted above, since Souza was affiliated with the Union, his application was not considered until the second round under HR 4.06. Before he could be considered, the Respondent selected another candidate during the first round of consideration. Souza was informed by Darosa that because he worked in a SEIU position at Tobey, he would not be considered during the first round of interviews and HR 4.06 was cited by Darosa for her rationale.

Inasmuch as HR 4.06 has a comparatively slight adverse impact on union represented employees, I find that the policy violates Section 8(a)(3) and (1) of the Act by relegating a represented employee to the second round of consideration. As such, Souza should have been considered along with all internal candidates during the first round of consideration. For Souza, the Acting General Counsel does not contend that he should have been hired for the building

superintendent position.¹⁵

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The Acting General Counsel also contends that Nunes was not considered for the CNA-I, CNA-II and the ORA-II positions. With regard to the CNA-I, Nunes was specifically informed by an email from the HR office that her application would not be considered until the second round because she was represented by the Union. With regard to the ORA-II position, the Respondent's job certification noted that Nunes' application was not for the first round of consideration. As with Souza, I find that the Respondent's policy of not considering represented employees until the second round of review has a comparatively slight adverse effect on Nunes when the Respondent failed to proffer any legitimate and substantial interests in promulgating such a policy. As such, the Respondent violated Section 8(a)(3) and (1) when it failed to consider Nunes for the CNA-I and ORA-II positions.¹⁶

¹⁵ Souza admittedly did not fully complete his job application when he failed to list his skills, qualifications, certifications and licenses which would have enhanced his selection for the position (Tr. 35-37; GC Exh. 4).

¹⁶ The parties agreed that the issue regarding the CNA-I and ORA-II positions was a "failure to consider" and not a "failure to hire" (Tr. 111). Nevertheless, testimony was taken as to the qualifications of the candidates for this position. The Respondent argues that Nunes would not have been considered because of a lack of qualifications for this position. Medeiros stated that the CNA-I position required "a Massachusetts nurse's aide certification and previous experience in acute care or long-term preferred." Continued

The Acting General Counsel argues that since HR 4.06 is a preference policy given to nonrepresented employees over union represented employees, the impact of this policy affects all represented employees at Tobey who may have applied for open positions at the Respondent's nonunion facilities and were not considered. As such, there are employees similarly situated to Nunes and Souza known only to the Respondent who were also adversely affected when not considered during the first round of review. With regard to these yet to be identified employees, I find that their employee rights were also adversely affected by HR 4.06 in violation of Section 8(a)(3) and (1).

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With regard to Nunes and the CNA-II position, it is not disputable that she was clearly late in the submission of her application for the CNA-II position. The posting of this vacancy was from August 9 to August 14. There was no reposting of the vacancy announcement or extension of time for the submission of applications for this position. On this point, Medeiros credibly testified that late applicants, whether represented or nonrepresented employees, would not be considered until the second round of review. The successful candidate was selected on September 15. Nunes submitted her application on September 20 and after the selection was made. Although Nunes was never informed that her application was late, it was obviously not submitted within the posting period. Consequently, her application could not be considered in the first round of review even absent the preference policy because of her late submission. This was equally true for several other applicants, both represented and nonrepresented employees, who had submitted their applications after the vacancy deadline (GC Exh. 10). Thus, Nunes was not singled out for disparate treatment due to her union affiliation since the record shows that both represented and nonrepresented employees with late submissions were also not considered (GC Exh. 10).

Therefore, I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act when it failed to consider Nunes for the CNA-II position. I find no merit in the allegation that Nunes was not considered for the CNA-II in violation of the Act and this allegation is dismissed.

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E. The refusal to hire Nunes for the ORA-I position and similarly situated Tobey employees violated Section 8(a)(3) and (1) of the Act

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The Acting General Counsel alleges that Nunes was not considered and not hired for the ORA-I position due to her union affiliation. It is without dispute that the Respondent did not considered Nunes' application until the second round as it was noted on the job certificate next to her name that she was "Not Hired, Position Filled-general-no interview SEIU (2nd round)." Consequently, I find that the Respondent violated Section 8(a)(3) and (1) of the Act when Nunes was denied consideration during the first round due to her union affiliation.

As narrated above, this position was offered to Mentzer, who subsequently declined the position. Medeiros testified that the position was reposted and that the applicants from the first job posting would not have to reapply. After the reposting, the position was offered to Dulude,

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The person selected, Christine Cabral (Cabral), was already a CNA in the Intensive Critical Unit (ICU) for the last 6 years working in the same facility (Tr. 189-192; GC Exh. 9). Similarly, the Respondent also argues that Nunes lacked the required knowledge of medical terminology for the ORA-II position. The Respondent, however, failed to distinguish between a failure to consider and a failure to hire. As noted, the Respondent did not consider Nunes during the first round of review because of the preferential policy. Whether or not the Respondent would have hired Nunes to these two positions is not an issue before me.

an external candidate. However, the offer made to Dulude was subsequently rescinded by the Respondent. Eventually, the Respondent selected Summer Sylvia for the position (R. Exh. 5).

Nunes testified she was not considered and not selected for the ORA-I position.¹⁷ I find, however, that Nunes was in fact considered for the ORA-I position during the second posting. Alongside Nunes' name for the second posting was a notation that stated "Has applied for the second posting and application forwarded to manager" (GC Exh.12). It would, therefore, be reasonable to conclude that Nunes' application during this second posting was considered. In fact, manager Marianne Almeida, did consider Nunes for the position, but determined that Nunes did not have EKG or phlebotomy experience (R. Exh 5).

The controversy here is whether Nunes should have been considered during the first posting of this position and ahead of an external candidate.

The ORA-I position required phlebotomy and EKG skills (GC Exh. 12; Tr. 197). The Respondent said Nunes did not have phlebotomy and EKG skills (Tr. 189; R Exh. 5). Nunes admitted that she did not have the required phlebotomy skills and was not certified for EKG, but maintains that she was informed by another coworker (Mary Guilotte) that the Respondent had taught Guilotte the requisite skills that she lacked once she was placed on the job. Nunes believed the Respondent would have also trained her in phlebotomy and EKG skills once she was placed in the ORA-I position (Tr. 93-95; 128). Medeiros, however, distinguished the fact that the Respondent may consider an applicant who lacks a "preferred" skill and a manager may be willing to train that applicant, but an applicant that lack a required skill is considered unqualified (Tr. 232-235).

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It is without dispute that Nunes did not have the required phlebotomy and EKG skills for the ORA-I position. The job posting required phlebotomy and EKG skills of the candidates. Nunes testified without contradiction that another employee was taught job skills after obtaining a new position. Medeiros did not contradict this statement, but rather, stated that a supervisor may train an incumbent employee who lacks a preferred skill, but a required skill would make a candidate unqualified in the first instance. On this point, I find that Medeiros' testimony not worthy of consideration.

From my review of the job applications, it would seem that the Respondent was also willing to train the successful applicant on the required skills. The Respondent offered the ORA-I position to Mentzer during the first round of the initial posting of the position. Mentzer had EKG skills and was already in an ORA position at the time of the first posting. He was in the process of obtaining his phlebotomist certification, it is not clear that he had such skills at the time of his application. With the two other applicants, Dulude and Sylvia, who were offered the position after Mentzer had declined the position, it was clear they did not possess all the skills needed for the ORA-I position. Dulude list EKG as one of her skills in her resume, but did not include knowledge of phlebotomy in her list of skills. Sylvia's application did not specifically indicate phlebotomy and EKG skills (GC Exh. 12). Consequently, it is reasonable to conclude that in this situation, even if the ORA-I position required phlebotomy and EKG skills, candidates

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¹⁷ The Board in *FES*, 331 NLRB 9 (2000), makes clear that it should be determined at the unfair labor practice hearing rather than the compliance stage of the proceeding whether the Respondent's failure to hire the applicants for employment constituted unlawful refusals to hire.

¹⁸ The Respondent had offered the position to another nonrepresented employee before making the offer to Mentzer. This individual declined the position on November 23 (GC Exh.12).

¹⁹ Medeiros was not certain if Mentzer had phlebotomy skills in his former ORA position (Tr. 232).

were offered this position without the required skills with the implicit understanding that the successful candidate would be trained in those skills.

Nunes was bypassed by the Respondent during the first round in order that an external candidate, Dulude, could be reached in the employment process. The bypassing of Nunes is inconsistent with the Respondent's stated policy to consider internal candidates (regardless if they are union represented or not) before external candidates. Dulude was working at a restaurant at the time the offer was made to her. Dulude was trained as a medical assistant and possessed EKG skills but phlebotomy skills were noted on her resume. Sylvia was a CNA at the time, but, like Nunes, she did not complete the work experience and qualifications section of her application which would have listed her skills in EKG and phlebotomy. But unlike Nunes, Sylvia was nevertheless selected. It is also important to note that Sylvia had actually withdrawn her application during the first round of consideration. As a result, the Respondent violated the employee rights of Nunes when her application was not considered in the first round along with Sylvia's application and before Dulude's application.

The Acting General Counsel argues that HR 4.06 is a preference policy given to nonrepresented employees over union represented employees, the impact of this policy affects all represented employees at Tobey who may have applied for open positions at the Respondent's nonunion facilities and were not hired. As such, there are similarly situated employees, like Nunes, known only to the Respondent also adversely affected when they were not hired for nonrepresented positions due to HR 4.06. With regard to these yet to be identified employees, I find that there employee rights were also adversely affected by HR 4.06 in violation of Section 8(a)(3) and (1).

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F. The refusal to consider and delay in the hiring of Nunes for the Mobility Aide position violated Section 8(a)(3) and (1) of the Act.

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The Acting General Counsel alleges that Nunes was not timely considered for the position of Mobility Aide at St. Luke's and that the Respondent delayed her selection to this position because of her union affiliation in violation of Section 8(a)(3) and (1) of the Act. I agree.

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As noted, the Mobility Aide position encumbered by Parent became vacant shortly after she was selected and the Respondent reposted the same position from December 9 through December 14. The Acting General Counsel argues that but for the Respondent's policy, Nunes would have been considered during the first round when the position was reposted. Nunes timely applied for this position on December 12 but was not considered with a notation alongside her name, "Application was not reviewed by manager." Instead, the Respondent considered and interviewed Knight, an external candidate, on January 6, 2012. The Acting General Counsel maintains that Knight, an outside candidate, should not have been considered before Nunes. Nunes was not interviewed for this position until either January 17 or 18, 2012 and the Respondent selected her for the position on January 30, 2012 (GC Exh. 16).

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The Acting General Counsel also maintains that Nunes was selected to this position because the Board had commenced an investigation into the charges in this complaint during the same timeframe as the Mobility Aide employment selection process. The Respondent denies that it had selected Nunes because of the pending Board investigation.

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It is not necessary for me to address the allegation that Nunes was selected because the Respondent was concerned over the Board's investigation since I find that discriminatee Nunes should have been considered before Knight, an external candidate, for this position. The

Respondent has consistently stated that external candidates would not be considered until all nonunion and union candidates were considered. Medeiros testified that the Respondent only review external candidates if there are no qualified internal applicants in the first or second round. This was not the case here. Knight was interviewed on January 6, 2012. Nunes was interviewed either on January 17 or 18. At the minimal, Nunes should have been considered on December 15 when the Respondent considered a nonrepresented internal employee (Sherrie LaBrode) for the position (GC Exh. 14) and Nunes was not because of HR 4.06.²⁰

The Respondent argues that Nunes would not have received the ORA-I and the Mobility Aide positions even in the absence of the policy and that there were other reasons why she was not selected. To establish a discriminatory refusal to consider, the Acting General Counsel bears the burden of showing 1) that the respondent excluded applicants from a hiring process; and 2) that antiunion animus contributed to the decision not to consider the applicants for employment. To establish a discriminatory refusal to hire, the Acting General Counsel must show 1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; 2) that the applicants had experienced or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirement were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. *FES* at 12. Once this is established, the burden shifts to the Respondent to show that it would not have considered the applicants even in the absence of their union affiliation or activity. *Wright Line*, 251 NLRB 1083 (1980); *FES*, supra.

However, under *Great Dane's* "comparatively slight" standard, it is unnecessary to decide, after determining that the Respondent has failed to establish its business justification defense, whether the policy was motivated by antiunion considerations. Inasmuch as I had determined that the Respondent has not made this requisite showing, I need not decide whether the Acting General Counsel established that the policy was motivated by antiunion animus. *National Football League*, supra at 81 fn. 15 ("...we also need not decide whether the General Counsel otherwise established that the rule was motivated by antiunion considerations" when the respondent failed to establish legitimate and substantial business justifications for the rule, citing *Great Dane*).

Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) when Nunes was not selected to the ORA-I position and when it failed to consider her during the first round of review which consequently delayed her appointment to the Mobility Aide position.²¹

²⁰ The Respondent selected Nunes for the position on January 30, 2012. Nunes said she gave a two week notice to her supervisor, but did not start her new job until March 15, 2012. Nunes was asked by her supervisor to stay in her former position a little longer because there was nobody available to replace her and Nunes agreed. To the extent that the Acting General Counsel believes that this delay was discriminatory, I find that it was not. The Respondent's hiring practices allow for up to 4 weeks before the applicant is placed or until the new position becomes available (GC Exh. 2). Here, in addition to the fact that Nunes' placement in her new position was shortly after the 4 week window, she also explicitly agreed to stay in her former position until another employee could be hired to replace her.

²¹ As noted, under *FES*, supra, the appropriate time in the Board proceedings to litigate the relative qualifications of the applicants is during the unfair labor practice hearing. The Acting General Counsel contends that there were other discriminatees known to the Respondent but were not identified or litigated during the hearing. The parties stipulated that if this case was to reach a compliance proceeding, the Respondent reserved the right to argue the qualifications of any identified applicants for each of the posted positions. To that regard, I make the following correction to the transcript: At page 244, lines 6-9, Continued

Conclusions of Law

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
 - 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent violated Section (a)(1) of the Act by promulgating and maintaining a policy giving first consideration to nonrepresented employee applicants and not considering union represented employee applicants until the second round of review in the employment selection process solely because of their union affiliation.
- 4. The Respondent violated Section (a)(1) of the Act by discouraging membership and other protected activities in a labor organization in promulgating and maintaining a policy giving first consideration to nonrepresented employee applicants.
 - 5. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider applicants Christopher Souza, Noelia Nunes and other similarly situated employees for hire.

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- 6. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Noelia Nunes and other similarly situated employees.
- 7. The unfair labor practices set forth above affect commerce within the meaning of the Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act by promulgating and maintaining a discriminatory hiring policy, I recommend that the Respondent rescind the policy and notify its employees and the Union that it has done so. Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act by its refusal to consider for hire Christopher Souza, Noelia Nunes and other similarly situated applicants to be identified in a subsequent compliance proceeding, I recommend that these discriminatees be consider for positions which they had applied or, if the positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by its refusal to hire Noelia Nunes to the position of ORA-I and Mobility Aide, I recommend that Nunes be offered employment to either position of her choice. If Nunes decides to retain the position of Mobility Aide, she would nevertheless be made whole for backpay from when the Respondent failed to select her for the ORA-I position to when she was eventually selected to the Mobility Aide position.

Further, I recommend that other similarly situated discriminatees, if any, to be identified in a subsequent compliance proceeding be hired into the positions which they applied or, if the

the word "not" should be added at line 7, to read as follows: "...the Hospital is reserving its right and [not] waiving its right to argue whatever arguments may exist based on the qualifications of the various applicants for each posted positions."

positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make Nunes and other similarly situated discriminatees to be identified in a subsequent compliance proceeding whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*,283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Additionally, in accordance with the decision in *Latino Express*, 359 NLRB No. 44 (2012), the Respondent shall compensate Nunes and other similarly situated discriminatees to be identified in a subsequent compliance proceeding for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar guarters.

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ORDER

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended:²²

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The Respondent, Southcoast Hospitals Group, Inc., its officers, agents, successor, and assigns, shall

1. Cease and desist from

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(a) Maintaining and enforcing a discriminatory policy with respect to the consideration, selection, employment and hire of transfer applicants that deprives employees of job opportunities on the basis of whether their current position is or is not a union represented position.

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(b) Refusing to timely consider or hire employees into positions they would have been timely considered or hired but for the Respondent's discriminatory hiring policy.

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(c) Discouraging membership in the Union or any other labor organization by refusing to consider, employ or delay employment of represented employees for employment because of their union affiliation or other protected activities or to discriminate against them in any other manner with respect to their hire or terms and conditions of employment.

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2. Take the following affirmative action which is necessary to effectuate the purposes of

the exercise of the rights guaranteed them by Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in

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the Act:

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²² If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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- (a) Within 14 days from the date of this Order, rescind the discriminatory hiring policy, and notify its employees and the unions with which it has collective bargaining agreements that the policy has been rescinded.
- (b) Within 14 days from the date of this Order, consider employees Christopher Souza, Noelia Nunes and other discriminatees to be determined at a compliance proceeding for the positions to which they had applied for and were not considered but for the Respondent's enforcement of its unlawful hiring policy or, if the positions no longer exist, to substantially equivalent positions as set forth in the remedy section of this decision.

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- (c) Within 14 days from the date of this Order, hire employee Noelia Nunes and other discriminatees to be determined at a compliance proceeding in the positions to which they would have been hired but for the Respondent's enforcement of its unlawful hiring policy, replacing the current occupants of those positions if necessary, or if the positions no longer exist, to a substantially equivalent positions and make them whole in the manner set forth in the remedy section of this decision.
- (d) File a special report with the Social Security Administration allocating Nunes' backpay and other discriminatees to be determined at a compliance proceeding to the appropriate calendar quarters and compensate her for any adverse income tax consequences of receiving his backpay in one lump sum, as prescribed in *Latino Express, Inc.*
- (e) Preserve and, within 14 days of this Order, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.
- (f) Within 14 days after service by the Region, post the attached notice marked "Appendix" in each of its hospitals in Tobey, St. Luke's, Charlton and all ancillary health facilities within the Respondent's network system. Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 21, 2011.
- (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

²³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

5	Dated: Washington D.C., June 12, 2013.		
10		Kenneth W. Chu Administrative Law Judge	
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APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT maintain and enforce an employment selection policy that discriminates against, discourages and disadvantages union represented employees by deferring consideration of their transfer applications at our nonunionized facilities until after nonrepresented employees' transfer applications have been considered.

WE WILL NOT refuse or delay to consider union represented employee for employment transfer because of the terms of a collective bargaining agreement to which they are subject.

WE WILL NOT refuse to consider or hire current employees for positions on the basis of union considerations.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the foregoing rights guaranteed under Section 7 of the Act.

WE WILL notify the Union, within 14 days, with which we have collective bargaining agreement, that we have rescinded the employment selection and hiring policy with respect to the transfer of union represented applicants for employment at nonunion facilities.

WE WILL consider employees Christopher Souza, Noelia Nunes and other similarly situated discriminatees to positions to which they applied and would have been considered and to offer them employment to those positions if applicable, or to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that they have enjoyed but for our unlawful refusal to consider and hire them.

WE WILL offer employment to Noelia Nunes in the position to which she would have been hired, replacing the current occupant of this position if necessary or to a substantially equivalent position, and make her whole, with interest, for any loss of earnings and other benefits she may have suffered as a result of our unlawful conduct.

WE WILL offer employment to other discriminatees to positions which they would have been hired, replacing the current occupants of those positions if necessary or, to substantially equivalent positions, and make them whole, with interest, for any loss of earnings and other benefits they may have suffered.

WE WILL compensate Noelia Nunes and other discriminatees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 calendar days from the date of the Board's Order, remove from our files any and all references to the unlawful consideration of Christopher Souza and refusal to hire of Noelia Nunes and other discriminatees and WE WILL, within 3 days thereafter, notify them and other discriminatees in writing that this has been done and that the unlawful discrimination will not be used against them and others in any way.

		SOUTHCOAST HOSPITALS GROUP, INC	
		(Employer)	
Dated	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601

Boston, Massachusetts 02222–1072 Hours of Operation: 8:30 a.m. to 5 p.m. 617-565-6700.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.